

May secrets be revealed for the public good?

Adapted from the writings of Dayan Yitzhak Grossman

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In the previous issue (tinyurl.com/y7ergrhk), we noted that software-based contact tracing of those infected by COVID-19 might entail privacy violations, and we discussed some halachic guidelines for the balancing of privacy rights against other considerations.

One context in which privacy rights are set aside for the benefit of the public welfare is *mamzeirus*. To prevent the illegal intermarriage between *mamzeirim* and non-*mamzeirim*, a *mamzer's* status was deliberately publicized at his *bris*,^[1] he was given the name Kidor to indicate his status,^[2] and there is even an opinion that the word "*mamzer*" should be branded on his forehead!^[3] (These practices are not generally followed today, perhaps because reliable and durable record keeping has rendered them unnecessary.^[4]) In the same vein, the standard sanctions for public humiliation are not imposed upon someone who truthfully calls another a *mamzer*,^[5] and some *Acharonim* explain that this is because publicizing *mamzeirus* is a *mitvzah*.^[6] There is an opinion that extends this to the exposure of an individual's past criminality, since disclosure of such information is also in the public interest, both because criminal behavior disqualifies someone from giving testimony or taking an oath and because the public may reasonably wish to be wary of someone with such a past.^[7] Others disagree and assert a "right to be forgotten," particularly when the infraction occurred "a long time ago" in the perpetrator's youth and his current conduct is upstanding.^[8] Similarly, there is extensive discussion in the *poskim* over the text of the *kesubah* for a woman who is a *be'ulah* but wasn't previously married. Some rule that the explicit term "*be'ulah*" should be used, to publicize the fact that the woman is prohibited from marrying a *kohein*. Others argue that this goal can be accomplished by simply omitting the standard term "*besulah*," or by substituting a variation such as "*kalsa*,"

“arusah,” or *“ulemta,”* which will be sufficient to indicate that she is not a *besulah*, and it is unnecessary and therefore wrong to publicly shame the woman. If the *bo’el* was someone who does not render the woman prohibited to a *kohein*, and certainly if it was the groom himself, some *poskim* even allow the use of the term *besulah*, since in those cases there is no public benefit to exposing her conduct. But most *poskim* object to such explicit falsehood and recommend the substitutes mentioned above, with some maintaining that *“beulah”* should be used even in this case.[9]

The halachic discussion most relevant to our context of COVID-19 contact tracing comprises various responsa concerning the disclosure of private medical information to forestall harm to others:

- R’ Yaakov Breish obligated a physician to violate medical confidentiality and disclose his patient’s terminal cancer (of which the patient himself was unaware) to his fiancée, due to the prohibitions of *lo sa’amod al dam reiecha* (do not stand by your fellow’s blood) and *lifnei iver lo sitein michshol* (before the blind do not place a stumbling block).[10]
- R’ Eliezer Yehuda Waldenberg and R’ Ovadia Yosef obligate physicians to violate medical confidentiality and disclose their patients’ medical conditions to the authorities when necessary to forestall harm to the public, e.g., to prevent an epileptic from driving a motor vehicle,[11] or to stop a vision-impaired person from driving, engaging in industrial work, or registering for military service.[12]
- R’ Shlomo Zalman Auerbach reportedly maintained that disclosing illnesses in appropriate circumstances is permitted but perhaps not mandatory.[13] On the other hand, he also reportedly maintained that a person’s positive HIV status must be disclosed to his or her spouse.[14]
- R’ Asher Weiss discusses the case of a young man diagnosed with a dangerous but treatable heart arrhythmia, which was apparently a genetic disorder. He considers whether the parents are obligated to inform the young man’s cousins so that they, too, can be tested for the problem and treated if necessary. He concludes that it is difficult to formulate a clear halachic rule, since it is hard to properly assess the

level of danger to the cousins and to determine the correct balance between that danger and the concern of the family for the infringement of its privacy. The correct course of conduct, he says, is to privately inform the cousins and request that they keep the information secret.

- With regard to a physician's responsibility, R' Asher Weiss declares that halacha recognizes no unique confidentiality obligation of physicians beyond that of everyone else. In general, forestalling danger to others overrides privacy concerns, and while as above, in this case the level of obligation is unclear, once again the correct course of conduct is to give the cousins the chance to get tested for the condition. While the physician is not obligated to expose himself to litigation and professional discipline and risk his livelihood by violating medical confidentiality, he should ideally devise a way to warn the cousins without breaching his confidentiality obligations.[15]

[1]*Rama* Y.D. 265:4 (citing Maharil).

[2]*Taz* *ibid.* s.k. 8 (citing Maharil).

[3]*Shu"t Zera Emes cheilek 3 siman 111*, cited in *Darchei Teshuvah* Y.D. *siman 180 s.k. 1*.

[4]See *Shu"t Bnei Vanim cheilek 4 siman 24*.

[5]*Rama* C.M. 420:38.

[6]*Shu"t Chavos Yair siman 62* and *Shu"t Shevus Yaakov cheilek 1 siman 179*, cited in *Pis'chei Teshuvah* *ibid.* s.k. 7.

[7]*Erech Shai* *ibid.* and *Shu"t Teshuras Shai (kama) siman 336*.

[8]*Chavos Yair* and *Shevus Yaakov* *ibid.*

[9]See *Otzar Haposkim E.H.* Vol. XVII *siman 66 s.k. 145-146*.

[10]*Shu"t Chelkas Yaakov E.H. siman 79*

[11]*Shu"t Tzitz Eliezer cheilek 13 siman 81 os 2*.

[12]*Ibid. cheilek 15 siman 13 os 1*. In both these cases, Rav Waldenberg rules that the physician is obligated to violate medical confidentiality despite having taken an oath to uphold it. See also *cheilek 16 siman 4*.

[13]Cited in *Nishmas Avraham* (Second Expanded Edition) *E.H.* p. 61.

[14]*Ibid.* p. 63.

[15]*Shu"t Minchas Asher cheilek 2 siman 127*. For extensive

discussion of medical confidentiality and halacha, see the entry for *Sodiut Refuit* in the *Encyclopedia Hilchatit Refuit*.